MEMORANDUM

Director, IHS

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY

TO : James O. Bartlett, Director
Office of Design and Construction
OFE

DATE: JAN 2 1979

FROM : Bernard Feiner BF
Assistant General Counsel
Business & Administrative Law Division

Legal contract Question

SUBJECT: Federal Construction on Indian Land

On or about June 27, 1978, Thomas E. Moore, the Regional Engineer for Region VIII (Denver), raised certain questions with you that called for legal opinions. Those questions (somewhat paraphrased), and the legal opinions relating to them, are as follows:

1. Is there authority for IHS to build Federal facilities on land leased from an Indian tribe?

As a general rule, Federal facilities may not be constructed on non-federally owned land. At common law the fee simple owner of land owns any improvements such as buildings on that land. That is true in the case of leased land, subject, however, to an agreement to the contrary between the lessor and the lessee. Accordingly, at the end of the leasehold term the lessor would acquire full title to the improvements placed thereon by the lessee unless the lessee has reserved the right to remove such improvements at the end of the lease term. An outstanding example is the case of the Roosevelt Hotel in New York City, which became the property of the New York Central Railroad upon the termination of its lease with the builder of the Hotel. As pointed out in a memorandum dated April 13, 1965 from Manuel B. Hiller to A.T. Hollister, Legislative Legal Liaison Officer, PHS:

> It is well established rule that appropriated funds may not ordinarily be used for the permanent improvement of private property unless specifically authorized by law. 35 C.G. 715, See also 15 C.G. 761; 20 id. 927; and 29 id. 279.

> This rule is based upon the fact that no Government official, in the absence of specific legislation, is authorized to give away Government property. (35 C.G. at page 716).

As was pointed out in that memorandum of April 13, 1965, temporary facilities may be erected on leased property provided that the right to remove them is contained in the lease instrument. Such a result requires, however, that there be authority to construct temporary facilities (which has been contained in the Indian Health appropriations under the phrase "purchase and erection of portable buildings") and that the facilities in question be in fact temporary in nature. Moreover, much of what is sometimes considered to be Indian tribal land is in fact land held in fee simple by the United States although in trust for the Indian tribe. The general rule stated above would, of course, have no application to such a situation.

As to Indian tribal land, Federal Indian Law (G.P.O. 1958) states at page 587:

> Although Indian tribal lands have been distinguished from public lands in various ways, there are certain situations in which tribal lands have been treated as public lands. For example it has been held that tribal lands, even though held by the tribe in fee, may be considered public lands of the United States for the purpose of erecting Federal buildings thereon, at least where Congress has directed such action, or where the tribe itself has consented to the action.

A footnote to the quoted excerpt cites, in addition to a memorandum of the Solicitor of the Interior, two decisions of the Comptroller of the Treasury, 6 Comp. Dec. 957 (1900) and 24 Comp. Dec. 477 (1918). The former decision stated at page 960:

> *** The same acts which make the appropriations for new buildings make large appropriations for the support of the school on the reservation, and as the funds provided for the support of the school is a gift it may, with some show of reason, be contended that it was the intention of Congress that the provisions for new buildings should be considered as a gift, and that the money should be expended on the land known to belong to the Indians in fee.

The latter decision stated at 24 Comp. Dec. 479:

> If the legal title to the land upon which it is contemplated to erect the buildings were in the Seminole Indians, then it might not be improper to use Government appropriations for the construction of the required buildings. ***

2. Must everything we build on property leased from an Indian tribe have a lease term, including options to renew, that is as long as the expected life of the facility?

In view of the answer to the first question, there is legally no such requirement even though such a lease term would be highly desirable. By the same token, there is no need to include a right in the Government to remove the improvements, especially since that normally entails an obligation to restore the promises to their original condition.

3. How does section 322 of the Economy Act apply to buildings erected with Federal appropriated funds on property leased from Indian tribes?

Section 322 of the Economy Act of 1932 (40 U.S.C. 278a) has no application to buildings erected by the Government on unimproved land. 38 Comp. Gen. 143 (1958). In any event, under the concept outlined in the answer to question 1, it would have no application to construction on Indian tribal land. If the building is erected by the Indian tribe itself using a Federal grant for the construction of a hospital for use by the Indians for hospital purposes, the act of leasing it to the Federal Government even for hospital purposes would not be a use by the Indian tribe in fulfillment of the purposes of the grant. Indeed, the Federal Government would, in effect, be paying twice for the facility. Moreover, the improvement of an Indian-owned hospital by the Government when leased by it would be governed by the same principles outlined with respect to question 1 in connection with original construction. If, however, the Indian tribe has already fulfilled its obligations to the Federal Government with respect to property granted or otherwise turned over to the Indian tribe, the Indian tribe may thereafter lease it to the Government and charge the Government rent therefor, subject to the Economy Act limitations. That is so because the Indian tribe would thereby in effect be giving up its unrestricted right to use the property for such other purposes as it may choose.

4. Under P.L. 93-638 may IHS make a grant to or a contract with an Indian tribe for the construction of a facility for IHS?

IHS may contract with an Indian tribe for the construction of a facility for IHS. Such a contract would ordinarily be entered into under the Buy Indian Act (25 U.S.C. 47) and title to the facility would be in the Federal Government. While theoretically such a contract could be entered into under the Indian Self-Determination Act (P.L. 93-638), it is difficult to envision what sort of function would be transferred to the Indian tribe unless it were to assume the operation of the hospital facility itself. A grant for that purpose could, however, be made under section 107(b), in which case title to the facility would vest in the Indian tribe. If it were thereafter to be leased to IHS for hospital purposes no rental could be charged for that purpose.

5. May a P.L. 93-638 contract be entered into for construction of quarters to be occupied by IHS employees?

The appropriation act for the Department of the Interior and related agencies for fiscal year 1978 (P.L. 95-74) contains at 91 Stat. 302 appropriations for Indian Health Facilities under the headings Department of Health, Education, and Welfare; Health Services Administration; Indian Health Facilities, as follows:

> For construction, major repair, improvement, and equipment of health and related facilities, including quarters for personnel ***

A contract for that purpose may be entered into with an Indian tribe under the Buy Indian Act (25 U.S.C. 47). The use of the Indian Self-Determination Act (P.L. 93-638) for that purpose is questionable inasmuch as it is difficult to see what function would thereby be transferred to the Indian tribe. This would be especially apparent in the case of the construction of quarters to be occupied by IHS employees on a rental bas If IHS were to construct such quarters itself, the purpose would be to provide quarters necessary to enable IHS empl

to carry out their prescribed functions and not to provide revenue to the Government. Indeed, any revenue derived therefrom would be deposited into Miscellaneous Receipts of the Treasury. If the quarters were to be constructed by an Indian tribe under P.L. 93-638, such rental proceeds would presumably not go to the Treasury but would go to the Indian tribe. In short, the production of revenue for the Indian tribe is not a function of IHS and is therefore not a function being "transferred" to the Indian tribe.

cc: Director, IHS
Duke McCloud, GCP

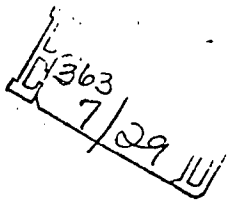
MEMORANDUM

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
HEALTH SERVICES ADMINISTRATION
INDIAN HEALTH SERVICE

TO : Jim Neifert
Office of Program Planning, DRC

DATE: JUL 28 1980

FROM : Richard J. McCloskey
Director, Office of Legislation
and Regulations Services



SUBJECT: Leased Housing for IHS Employees

The Office of the General Counsel (OGC), Business and Administrative Law Division, has responded to the question of the legal permissibility of the government leasing quarters to IHS employees at less than the cost to the government for those quarters. The OGC memorandum reflects a certain lack of knowledge concerning the economic facts involved. This leads to their questioning the rental amounts. Any large disparity between the economic cost of a unit and the rental amount permitted to be charged can be expected to raise questions so I urge you to assure that both the Economy Act (40 U.S.C. 278a) and the "Policy Governing Charges for Rental Guarantees and Related Facilities" (OMB Circular A-45) be strictly applied so as to forestall future problems or questions.

Nevertheless, the legal doubts raised by the earlier memorandum of the Regional Attorney are answered in the July 10, 1980, OGC opinion. The best summation is to quote the relevant parts.

* Section 704 of the Indian Health Care Improvement Act, (P.L. 94-437) authorized IHS to lease living quarters from Indian tribes. This authority is subject to 40 U.S.C. 278a, which prohibits the government from leasing a building at a yearly rental in excess of 15 percent of the fair market value of the rented premises at the date of the lease.

* The employee's rental must be calculated in accordance with OMB Circular A-45, "Policy Governing Charges for Rental Guarantees and Related Facilities," October 31, 1964, which essentially requires that the government charge employees a "fair rental rate" based on prevaling local rates.

. . . . .

* As long as the rental rate to the employee is set in accordance with OMB Circular A-45, there would appear to be no improper supplementation of compensation. Furthermore, the government's lease rate from the Indians is restricted only by the 15 percent limit of 40 U.S.C. 278a. Thus if these requirements are followed, technically there is no violation of law.